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including the right to development**

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey: comments by the State

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the comments by the State on the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey.



Report of the Special Rapporteur the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey: comments by the State*

Response to recommendations

The Government of the Republic of Turkey notes the cooperation of Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression with Turkey in the context of his mandate. After studying the Report which was prepared by the Special Rapporteur's office following his mission to Turkey from 14 through 18 November 2016, the Government of the Republic of Turkey would like to highlight the following:

At the outset, the Government wishes to remind that FETÖ/PDY (Fetullahist Terrorist Organization/Parallel State Structure) is an armed terrorist organization established by Fetullah Gülen which aims to suppress, debilitate and direct all the Constitutional institutions, to overthrow the Government of the Republic of Turkey and to establish an oppressive and totalitarian system through resorting to force, violence, threat, blackmailing and other unlawful means. Accordingly, the references to the said group in the Report such as "*Gülen movement*" (Paragraph 26), "*Gülenist movement*" (Paragraph 31 and Paragraph 56), Gülenists (Paragraph 71) should be corrected as FETO (Fetullahist Terrorist Organization) or "members of FETO" where necessary.

The Government further would like to underline that PKK is a vicious terrorist organization, which is included in the lists of terrorist entities of the EU as well as USA and many other countries in the democratic world. For decades, Turkey has been countering PKK terrorism which claimed thousands of lives of innocent people and violated the fundamental¹ rights and freedoms of people; first and foremost, the right to life. Accordingly, it is deplorable that the terrorist nature of this organization and the grave threats that it poses in Turkey have not been duly reflected in the Report (Paragraph 5, Paragraph 41, Paragraph 55, Paragraph 57).

Introduction

It should be reminded that freedom of expression and the media constitutes one of the foundations of Turkish democracy. The Constitution guarantees the right to express and disseminate thoughts and opinions without interference by official authorities as well as the freedom of the media. It provides that no one shall be blamed or accused because of his/her thoughts and opinions.

While acknowledging the serious nature of the security challenges that Turkey faces in recent years, the Report cites in Paragraph 7 unsubstantiated, generic and vague claims such as "*legal and institutional pressures*" and "*squeezing of civil society space*", "*radical backsliding from Turkey's democratic path*". Turkey remains resolved to further align its legislation and implementation with the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) with a view to further strengthening fundamental rights and freedoms, including freedom of expression and the media. Those claims set forth in Paragraph 7 are neither appropriate nor in line with the realities on the ground.

The Government would further like to inform that the criminal terrorist acts perpetrated by FETO elements during the attempted coup on 15th July 2016 caused the deaths of 249 persons, including 181 civilians and the figures in the Report should be corrected accordingly.

Legislation

* Reproduced as received.

Paragraphs 14-18 claim that "Article 7 of the Law No: 3713 (cited in the Report as 37137 mistakenly) permits punishment of those who make "propaganda" for a terrorist organization, but key terms are left undefined and other legislation include vague terms on the issue".

The Government wishes to inform that the elements of the offence set out in Article 7 § 2 of the Law No: 3713 (Anti-Terror Law) were redefined on 30 April 2013. As per the amendment, the act of making propaganda of terrorist organizations by justifying or praising or inciting their methods has been recognized as an offence only if they contain violence, force or threat, which is in compliance with the case-law of the ECtHR.

Thus, the nature of the offence has been further concretized and the provision has narrowed in order to bring the judicial practice further in line with the case-law of the ECtHR. Accordingly, peaceful enjoyment of freedom expression in this respect will not any more constitute a crime.

The Article reads before and after the amendment as follows:

Art. 7 § 2 (Former Version)	Art. 7 § 2 (Amended Version)
Anyone who makes propaganda of a terrorist organization shall be sentenced to imprisonment for a term of one to five years (...)	Anyone who makes propaganda of a terrorist organization by justifying or praising or inciting the terrorist organizations' methods which contain violence, force or threat shall be sentenced to imprisonment for a term of one to five years (...)

Paragraph 18 sets forth the claim that "Article 299 of the Penal Code criminalizes defamation of the President, with sentences of one to four years in prison and reports indicate that the Justice Ministry has initiated up to two thousand defamation cases for 'insult' of the President".

The Government wishes to highlight that the Article 299 of the Penal Code was adopted in light of international conventions to which Turkey is a party. There are similar provisions in penal codes of other Council of Europe member states. Freedom of expression is one of the basic tenets of a democracy based on the rule of law. However, this freedom does not include insult and statements that spread, incite, promote or justify hatred or expressions constituting hate speech. Recent acts constituting defamation against the President are mostly in the form of vulgar and disgraceful swearing and are not based on facts or criticism. Most of these cases also concern hate speech. These statements have nothing to do with freedom of expression. In July 2016, the President, as a clear sign of his good intentions and for encouraging reconciliation in the society, decided to withdraw cases of insult against him and his family except some very serious ones.

It is claimed in **Paragraph 20** that "Law no.5651, The Internet Law, allows the Government to restrict access to Internet content and telecommunications network. Amendments in March 2015 introduced Article 8(A), which expands the power of the Telecommunications and Communication Presidency (TIB) to order the blocking of websites on vaguely defined grounds and without prior court approval."

The Government wishes to highlight that Law numbered 5651 is not about telecommunications network and its restrictions. Amendments in March 2015 introduced Article 8(A) which aimed to ensure that protective measures can be taken with respect to

violations that can occur in the Internet within limited time involving one or several of the grounds of protection of national security and public order.

In emergency cases, removal of content and/or blocking of access decisions under Article 8/A are taken by the Information and Communication Technologies Authority (ICTA) upon the request of the Prime Ministry or relevant Ministries and decisions are submitted to the court for approval within twenty-four hours. In these cases, the judge declares her/his decision within forty-eight hours and otherwise the decision is revoked automatically.

In **Paragraph 21**, it is stated that "as of 2015, the government had used the blocking measures, along with related court decisions, to block over 110,000 websites and over 16,500 URL's." The Government wishes to point out that the Report refers to speculative data gathered from unofficial resources. The proceedings regarding blocked illegal contents are related with criminal issues (approximately 99.5%) such as child sexual abuse, obscenity, prostitution, etc.

In **Paragraph 21**, it is also stated that "in requesting access bans, the office of the prime minister submits a formal request to ICTA, which must forward the request to a Criminal Peace Judge within a 24-hour period. If approved, all relevant service providers are obligated to acquiesce to the decision. There is no appeal following a court order." The Government would like to clarify that general appeal procedures are valid for the said court decisions and also option of individual application to the Constitutional Court is available. It is also not true that "the ICTA requires providers to use government-approved filtering systems." Previously, according to the "Regulation On Internet Public Use Providers", only internet cafes required to use approved filtering system. This obligation has been lifted with the amendment made in the regulation.

Regarding **Paragraph 22**, it should be stressed that Article 4 of the Internet Law is only about the responsibility of the content providers, not "taking down content".

State of Emergency

On the night of 15 July, upon the instruction of the founder and leader of the FETÖ/PDY, Fetullah Gülen, and in line with the plan approved by him, a group of terrorists in uniforms within the Turkish Armed Forces attempted an armed coup against the Turkish democracy for the purpose of overthrowing the elected president, Parliament and Government together with the Constitutional order. Taking the existing condition into account and in order to fight effectively against the FETÖ/PDY in line with the recommendation of the NSC, by the decision of the Council of Ministers, a nationwide State of Emergency has been declared as from 21 July 2016 for three months, pursuant to Article 120 of the Constitution and Article 3/1-b of the Law No. 2935 on State of Emergency.

With a view to ensuring continuity of the effective implementation of measures for the protection of Turkish democracy, the principle of the rule of law, as well as the rights and freedoms of the citizens, the Council of Ministers decided to extend the State of Emergency, lastly until mid-July 2017.

In this context, Turkey resorted to the right of derogation from the obligations in the European Convention on Human Rights (ECHR) and International Covenant on Civil and Political Rights (ICCPR). Notifications of derogation from Convention obligations were submitted to the Council of Europe in accordance with Article 15 of the ECHR and to the Secretariat of the United Nations in accordance with Article 4 of the ICCPR, concerning the rights permitted by the Conventions. This includes Article 19 of the ICCPR, concerning freedom of expression, which is not listed among the non-derogable articles.

In this process, Turkey is fully aware of its obligations under international conventions and acts in full respect for democracy, human rights, the principle of rule of law. Due respect is shown to fundamental rights and freedoms and the rule of law is strictly observed. The principles of "necessity", "proportionality" and "legality" have been sensitively complied. The Government would also like to underline that while taking the measures under Article 15 of the ECHR, the State parties naturally continue to be subject to the supervision of the ECtHR.

A Decree with Force of Law (Decree Law) is a legal measure permissible in the context of State of Emergency in Turkey and they are approved by the Parliament. By the Decree Laws issued within the scope of the State of Emergency, measures have been taken in proportion to the present situation that the administrative authorities are faced with, to the extent necessitated by the situation and in pursuit of a legitimate aim which is national security. Legal remedies are available.

FETÖ/PDY is an atypical armed terrorist organization which is scarcely encountered in the world, unlike PKK or DAESH. In this perspective, the required measures are taken with a view to averting the organization's strength within the state. In the meantime, the scope of the Decree Laws issued in this respect has been limited to the terrorist organizations in order not to interfere with the rights and freedoms of others.

The Government wishes to underline that it was due to increasing threats against the survival of the state and the nation that made inevitable to take measures under State of Emergency since 21 July 2016.

State of Emergency measures are constantly reviewed. In this process, Turkey maintains a close dialogue with the Council of Europe organs and mechanisms. With the existing domestic remedies, to date, over 300 institutions (including 187 associations, 21 foundations, 92 private education institutions, 5 radio-TV channels, 17 newspapers and 1 private health institution) have been reopened and more than 30 thousand public employees have been reinstated. With the decree laws issued on 23 January 2017, further measures have been introduced. For instance, the Inquiry Commission on State of Emergency Measures has been established as a domestic legal remedy, to address applications in particular against dismissals and closure of associations, institutions including those of media which were carried out as listed in relevant decree laws. Decisions taken by this commission are subject to judicial review. Furthermore, the maximum duration of police custody has been reduced from thirty days to seven days. Lastly, the provision enabling public prosecutors to impose restrictions up to five days for the persons in police custody in consulting their lawyers has been abolished.

In this context, the claims such as in the **Paragraph 28** that *"the state of emergency decrees adopted in the aftermath of the coup attempt are far reaching"* are neither appropriate nor reflect the realities.

So called "Attacks on the Media and right to information"

The Government wishes to stress that the activities of many of outlets cited in the Report were ceased due to their established links with terrorism and terrorist organizations. They are subject to criminal investigations. In the context of these investigations, a number of Criminal Magistrates' Offices indicated that those press and media organizations made publications as per instructions of the founder and the executives of terrorist organizations in order to achieve their illegal goals.

Certain individuals who have been working as journalists or media workers are currently charged with serious crimes - such as being a member of, or supporting an illegal or armed terrorist organization. The criminal investigations and prosecutions are conducted against the concerned persons for their activities which are defined as an offense pursuant to the Turkish criminal legislation. The related investigations are not due to their journalistic work but due to their support and link to the terrorist organization and other non-journalistic activities, or using their profession in the service of terrorist activities.

In **Paragraph 36**, as to the case of daily Cumhuriyet, the Government refers to the fact that it has submitted comprehensive information on the nature of proceedings against the said newspaper to the UN Working Group on Arbitrary Detention per latter's communication dated 2 February 2017 (Reference: 2017/TUR/Case/2). For the ease of reference, it is annexed herewith.

The claims in the **Paragraph 36** that *"the legal actions taken against the newspaper Özgür Gündem targeted both its regular staff and people who had loose connection to the newspaper, such as its advisors or symbolic editors, many of whom are intellectuals*

wanting to make a contribution towards solving the Kurdish issue through dialogue" are at odds with the realities. There were previous criminal investigations concerning Özgür Gündem and the charges included making terrorist propaganda for the PKK terrorist organization. The newspaper was closed down with Decree Law 675.

In **Paragraph 37**, it was asserted that Silivri Prison housed an estimated thirteen thousand prisoners. It is misleading that a single prison in Silivri hosts thirteen thousand inmates. The said facility is a combination and a general campus of ten prisons and detention houses. As of 16 November 2016, the prison visited by the Special Rapporteur hosted only four hundred and fifty six prisoners.

Also in **Paragraph 38** it is claimed that "on 28 September 2016, another 12 television and 11 radio stations (owned or operated by members of the Kurdish or Alevi minorities) were shut down, without the involvement of the judiciary or any review procedure, on charges that they spread "terrorist propaganda". The Government wishes to inform that Turkish citizens of Kurdish or Alevi origin are not minorities in Turkey. Minority rights in Turkey are regulated in accordance with the Lausanne Peace Treaty of 1923, under which Turkish citizens belonging to non-Muslim minorities fall within the scope of the term "minority".

The constitutional system in Turkey is based on the equality of all individuals without discrimination before the law, irrespective of "language, race, colour, gender, political opinion, philosophical belief, religion and sect, or any such consideration" (Art. 10, Constitution). All citizens, regardless of whether they are recognized as a minority, enjoy rights and freedoms also in respect of their origins.

Furthermore, these televisions and radio stations mentioned in **Paragraph 38** were shut down in September 2016, as their affiliation and/or connection with terrorist organizations were proven. The shutdown decisions were taken not because of the owners of the televisions or radio stations but because of the violations.

Restrictions on Internet

With regard to **Paragraphs 48-54**, it should be emphasized that the Turkish national legislation, in the first place, makes use of a "notice and take down" procedure regarding internet governance, in line with the principle of proportionality. Under this procedure, the content and hosting providers can be first contacted to demand the removal of a particular content. It is also possible to apply to the court which may order the removal of the content on the grounds of inter alia national security and public order, prevention of crime or protection of public health. In cases in which the content removal is not technically possible, the court may order, as a last resort, blocking access to the internet site which publishes the content in question.

Only as an exception, in cases where delay may cause irreversible damage, the national legislation authorizes the Prime Ministry to take any necessary measure on the aforementioned grounds and to notify the Information and Communication Technologies Authority (ICTA) for implementation. The decision is conveyed to access and hosting providers which are to implement it within two hours. Then decision is submitted for the approval of the judge within 24 hours. The judge shall announce his/her decision within 48 hours. If not, the restriction shall be automatically lifted.

The main reasons behind resorting to the measure of access blocking derives from the technical difficulties in removing a particular content from most of the internet sites. It is technically not possible to block access to a particular content in internet sites in "https" format. In these cases, if the content is not removed by the content or hosting provider in line with the relevant order, then the only option for the authorities turns out to be access blocking. In other words, at the heart of the problem, there lies the non-compliance of content and hosting providers with the relevant court decisions and the universal principles of the rule of law. Internet governance lays responsibility not only on governments but also on all stake-holder including content and hosting providers. They should act in accordance with professional ethics and comply with the court decisions.

In **Paragraph 49**, it was stated that *"the TIB blocked access to five of the most commonly used LGBTI websites"*. The Government would like to reiterate that all blocking access orders are subject to technical and legal supervision under the scope of Law No. 5651 and no special measures have been taken with regard to the "LGBTI" sites, other than those related with child sexual abuse, obscenity and prostitution.

Regarding **Paragraph 50**, the Government would like to set the record straight on the fact that in Turkey there has been no ban decision related to search platforms.

As for removal requests sent to Twitter and Facebook mentioned in **Paragraph 52**, the Government wishes to state that internet actors (content and hosting providers) are expected to develop effective mechanisms in order to solve complaints pertaining to fake accounts, account takeovers, violation of personal rights and/or private life and inappropriate content. Their reluctance to take required measures for user complaints on content that clearly violate even their own policies compel users to apply for related public institutions and legal authorities.

Although it is required to take immediate measures by virtue of a court decision related to such illegal content, these actors frequently continue to broadcast for days. The representatives of the relevant companies have been notified over and over that the courts and related institutions have to step in when user complaints are not solved effectively. Unfortunately, the expected results have not been achieved.

As an addition to information submitted in **Paragraph 54** of the Report, the Government wishes to further elaborate on the nature of application called "Bylock" and the intensive use of this application as a communication tool by the members of the terrorist organization FETÖ/PDY. As specified in the court decisions in Turkey, it is commonly known that this programme is an encrypted communication programme used for secretive illegal communication and organizational contact among the members of the FETÖ/PDY terrorist organization.

In the national court decisions, considerations with regard to the application called Bylock are as follows:

- 1- ByLock application was put through technical works such as reverse engineering, analysis of encryption, analysis of network behaviour and the codes of the servers connected.
- 2- It was observed that ByLock application had a design encrypting each message sent with a different encryption in order to ensure the communication with a strong encryption system via Internet connection.
- 3- The elements supporting the fact that Bylock application was made available for FETÖ/PDY members under the disguise of a global application are as follows;
 - There are some "Turkish" expressions in the source codes of the application.
 - User names, group names and most of the codes cracked comprise of Turkish expressions.
 - Almost all of the contents cracked is in Turkish.
 - Although the administrator of the application server claimed that they blocked access to the application with the IP addresses from the Middle East, almost all blocks were aiming at IP addresses from Turkey.
 - Those wishing to download the application were obliged to access to it via VPN in order to disguise identities of the users accessing from Turkey and the communication. In addition, almost all the searches about ByLock over "Google" were made by the users from Turkey.
 - There has been an increase in "Google" searches about the application as of the date of blocking access to the application with IP addresses from Turkey. Moreover, posts were shared in favour of FETÖ/PDY mostly

through ByLock related online media (social media, web sites, etc.) via fake accounts.

- ***“ByLock”, which had a user group more than two hundred thousand, was known by neither Turkish public nor foreign people before the 15th July terrorist coup attempt in Turkey.***

- 4- It was established that signing up to the application was not sufficient to contact with the users in the system; user names/codes provided mostly face-to-face or by an intermediary (courier, an existing ByLock user etc.) should be added by both sides in order to communicate with each other. It was designed in a way that it will allow to have communication only in accordance with the cell type communication because messaging could be started after both users added each other.
- 5- Voice call, instant messaging, e-mail delivery and file transfer can be carried out with the application. It was also assessed that organizational communication needs of the users were met by this without needing any other communication tool, and as all the communication was transmitted through the server, groups created and the contents of the communication could be monitored and controlled by the administrator of the application.
- 6- The correspondence is deleted automatically from the device in specific periods without requiring a manual process. This indicates that the system has been designed in a way that will take the necessary measures even if the users forget to delete the data for the communication security. Therefore it has been established that ByLock application was designed in a way that will prevent to access to the past data of the users and the correspondence if the device is seized as a result of a probable judicial proceeding. In addition, server and communication data of the application is encrypted in the application database and this is regarded as an additional security measure in order to prevent identification of users and ensure the communication security.
- 7- In order to disguise themselves, the users set a unique and quite long password. For example, there are passwords consisting of about 38 digits among the data, analysis of which have been completed, and more than half of the passwords, analysis of which have been completed, consist of 9 digits and more.

Instead of downloading the application from Android or Apple AppStore after a certain date, the application was uploaded into the devices of users manually. It was also observed that almost all of the messages, which were obtained and analysis of which were completed, included organizational contacts and activities, corresponded to the jargon of the organization.

- 8- It was understood from the statements of organization members being subject to judicial control proceedings (custody, arrest, apprehension, etc.) after the military coup attempt staged by FETÖ/PDY units on 15 July 2016 that, it was used as an organizational communication tool by the members of FETÖ/PDY organization

Academic Freedom

With regard to Paragraphs 55-57 on academic freedom, the Government wishes to state that recent measures have been directed towards ensuring and maintaining the academic autonomy of Turkish universities. It is evident that a well-organized illegal terrorist organization such as FETÖ/PDY is one of the biggest threats to the autonomy of academic institutions and the academic freedom of faculty members. Therefore, it was quite necessary to be persistent in cutting the ties of any illegal organization with Turkish universities.

As for so-called "Peace Petition" mentioned in Paragraph 57, the Government wishes to remind that it has submitted comprehensive information to the UN in response to the Joint Urgent Appeal of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders dated 31 March 2016 (REFERENCE: U.A. TUR.3/2016). The Government's response is enclosed for perusal and reference.

Certain number of academic staff has been dismissed from their universities as a result of investigations. The expelled academics were proved within the limits of Turkish Law to have close ties with FETÖ/PDY. However, those who have been found innocent are allowed to take their posts back immediately in accordance with the respective Decree Laws numbered 673, 677, 679, 688, 689, and 690. More than a hundred academics have been reinstated to their positions up until today. In addition to executive orders, appeal process is open for the dismissed academic staff as well as other civil servants.

In Paragraph 56 it is stated that "the licences of approximately 21,000 teachers in Gülen operated schools were cancelled". It should be emphasized that the licences of these teachers in private schools were not cancelled just because these persons were working at those schools, but they had worked for FETÖ/PDY. After the cancellations, the situation of teachers who applied by claiming that they were wrongfully suspected were investigated by the Boards formed in provinces and 1,335 teachers licenses were issued back.

Regarding the university elections mentioned in Paragraph 57, it should be emphasized that Turkish constitution grants authority to the President in appointing university rectors since 1981. Today, President of Turkey appoints the rectors upon Council of Higher Education's assessment of the nominees.

Political Activity

As far as the HDP is concerned, the Government wishes to clarify that HDP is not the main opposition party in Turkey as stated in **Paragraph 58**. Main opposition party is another party, namely CHP. Furthermore, in June 2016, the immunity of 154 MPs from **all political parties** represented in the parliament including the ruling AK Party was lifted as a result of 810 pending case files before the judicial authorities.

Dismissal of public officials

In **Paragraph 59** it is stated that "*between the time of the attempted coup and the Special Rapporteur's visit, approximately 74,000 public officials had been removed from government positions, and 100,000 had been removed from public office for political, religious or other beliefs. The dismissals take place without trial, investigation or appeal possibilities.*"

The Government wishes to reiterate that those individuals are dismissed or suspended not because of political, religious or other beliefs, but due to their membership, affiliation or connection to terrorist organizations and their support to them. No state can accept elements within public institutions that misuse their authority and public resources to realize illegal goals of terrorist organizations.

Measures are taken within the limits of the rule of law and our international obligations. Boards have been established at the office of Prime Minister and the Offices of Governors across Turkey for the people "who believe they have been wrongfully suspected". To date, over 30 thousand employees have been reinstated.

Moreover, with the Decree 685 dated 23 January 2017, an Inquiry Commission on State of Emergency Measures has been established as a binding legal remedy to address measures that are taken directly with Decrees. The Commission will assess applications regarding dismissals of public employees and closure of associations, institutions, as well as media outlets, as listed in relevant Decrees.

This provides an effective domestic legal remedy concerning such cases. The Commission is entitled to take binding decisions with due process. Decisions taken by the Commission are also subject to judicial control. Its decisions can be challenged before relevant courts.

The Commission's members have been recently appointed (16 May 2017) and started its work (22 May 2017). It will soon start to receive applications concerning cases that are listed in relevant Decrees. These reviews will demonstrate once again the Government's determination to follow the principles of necessity and proportionality in State of Emergency measures.

Civil Society

In **Paragraph 41**, various claims raised regarding the closure of NGOs in Turkey. The Government would like to remind that there are about 110 thousand associations and 50 thousand foundations currently operating in Turkey. Certain associations were found to be linked with terrorist organizations (HIZ, PKK, DHKP-C and DAIŞ) and these were closed with Decree Laws. However, 187 associations and 21 foundations were reopened by Decree Laws. The measures are constantly reviewed and the Inquiry Commission on State

of Emergency measures (see paragraph 36) will also address applications concerning closure of associations and institutions.

In **Paragraph 46** of the Report, it was alleged that "the judiciary appeared to be increasingly unavailable to the tens of thousands of individuals who had lost their employment according to vague accusations of association with the Gülenist movement and Kurdish organizations".

Article 148 of the Turkish Constitution provides that decrees having the force of law issued during a State of Emergency shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance and in accordance with Article 121 of the Constitution, Decree Laws are submitted to the Grand National Assembly of Turkey for approval on the day they have been published in the Official Gazette. Nevertheless, judicial review is possible in respect of measures by public institutions which have been introduced based on the procedure laid down in Decree Laws. Since such measures based on the powers conferred by Decree Laws are open to judicial review, individual applications are also possible against these measures.

However, as the dismissals made directly through Decree Laws technically have the nature of legislative activities, filing objections or making individual applications against these measures were not possible until the adoption of the Decree-Law no. 685. With the adoption of the Decree-Law no. 685 on January 23, 2017, the Inquiry Commission on State of Emergency Measures was introduced to examine and conclude applications related to dismissals from profession, removal from studentship, closure of institutions and organizations, and deprivation of ranks from retired officials on grounds of membership, affiliation or connection to terrorist organizations, when imposed directly through decree laws. This Commission is entitled to take binding decisions with due process. Decisions taken by this Commission are also subject to judicial control. Its decisions can be challenged before relevant courts.

As mentioned before, the Commission's Members have been recently appointed (16 May). It will soon start to receive applications concerning cases that are listed in relevant Decrees. Upon a decision of reinstatement by the Commission, the State Personnel Department shall reappoint the official concerned, reserving his/her vested rights. Those who had been removed from executive positions shall be appointed in line with their previous posts. Moreover, any party claiming that the Commission's decision violates their interests shall be able to file an action with administrative courts for the amendment of these decisions.

By the Decree-Law no. 66⁶, members of the judiciary who were dismissed from profession by the Board of Judges and Prosecutors (BJSK) and by higher courts, are entitled to file an action directly with the Council of State. These provisions shall apply to those who had previously filed actions or even for those about whom decisions have already been taken.

By the Decree-Law no. 185, effective domestic remedies have been introduced in respect of measures imposed or to be imposed by State of Emergency Decree Laws.

Structural changes to judiciary

In **Paragraph 68** of the Report, concerns were raised as to the independence of the judiciary, followed by comments on the establishment of criminal magistrate's offices and the relevant appeal procedure.

The Government wishes to underline that by the promulgation of the Law no. 6545, amending the Penal Code, on 18 June 2014, among others, Criminal Courts of Peace were revoked and replaced by Criminal Magistrate's Offices, entrusted with taking the necessary decisions within the purview of judges in all investigations conducted, carrying out relevant duties and examining the objections made against these decisions. The establishment of Criminal Magistrate's Offices was aimed at ensuring specialisation on investigatory proceedings and uniform practice, and gradually achieving nationwide standards in the decisions taken regarding protective measures.

In terms of appointment and benefits, criminal magistrates are not different from other criminal court judges. They are appointed by the BJSK, which has administrative and financial independence under Article 159 of the Constitution, in accordance with the guarantees of "independence and impartiality of judges". The Constitutional Court has examined, both as a response to an individual petition and through the review of norms, the institution of criminal magistracy. The court decided that criminal magistrates, not dissimilar to other judges, were appointed by the BJSK, and they possessed the security of tenure envisaged in the Constitution. The Constitutional Court ruled that there was no reason to suspect that these magistrates were in a different position than other judges and that safeguards for their independence were compromised (see no. 2014/164 E, 2014/112 R, review of norms; and *Hüner Kiper and Others* (individual application, no. 2016/14961)).

The legislation has envisaged that appeals against the decisions by Magistrate's Offices, which were established as a specialisation authority for decisions at the investigation stage, shall also be concluded by these Magistracies. This conclusion is in line with the legislator's intention to separate the proceedings at the investigative stage from that of the prosecution stage. Moreover, it serves to ensure specialisation and uniformity. In accordance with the Article 267 of the Law No. 5271, decisions of the criminal magistrate's offices are subject to objection and a procedure is available for the effective supervision of decisions taken in investigative stage regarding the protective safeguards.

Although it is a matter of criticism that appeals to decisions by Magistrate's Offices shall also be reviewed by the same authority, the rule should not be considered incompatible with the ECHR principles taking into account the following reasons:

Criminal Magistrate's Offices have no duties at the trial stage:

They are not empowered to give a final verdict in respect of suspects or defendants; and

The decisions of protective nature they may take during the investigation stage come under review by the trial court following the approval of the bill of indictment.

The appeal review is not a material examination of any Magistrate's decision by another but appeals are submitted to the next or closest criminal magistrate.

Like other judges, Criminal Magistrates are appointed by the BJSK with regard to their career features, competences and merit. There are no elements in the establishment or functioning of these posts which lead to the conclusion that they may not serve with impartiality. However, if it can be demonstrated by concrete, objective and convincing

proof that a judge has lost his/her impartiality, he/she can be removed from conducting the trial in line with procedural law.

As one can observe from the judgments of the Constitutional Court and similar case-law of the ECtHR, with regard to their appointment procedures, duties, competence and work procedures, criminal magistrate's offices have been established and have been serving in line with the principles of natural justice and independence/impartiality.

Dismissals of judges and prosecutors

In **Paragraph 70**, it was falsely asserted that *judges and prosecutors were removed "under emergency decree"*. The truth is, although many public officials were dismissed by the inclusion of their names in the lists annexed to emergency decrees, judges and prosecutors are actually dismissed from profession by decisions taken by the General Assembly of the HSK.

HSK is the authority to take decisions on removing judges and prosecutors from office who were found to have membership, affiliation, connection or links to terrorist organizations. A long-standing administrative inquiry has identified these persons as being members of the FETÖ/PDY, and an investigation was initiated *ex officio* under Article 161/6 of the Code of Criminal Procedure and detention orders were taken by the Ankara Chief Public Prosecutor's Office. These circumstances have been taken into account and the judges and prosecutors who were found to have membership, affiliation, connection or links to terrorist organizations were dismissed by the General Assembly of the HSK.

As mentioned before, by the Decree-Law no. 667, members of the judiciary who were dismissed from profession by the Board of Judges and Prosecutors (HSK) and by higher courts, are entitled to file an action directly with the Supreme Administrative Court. These provisions shall apply to those who had previously filed actions or even for those about whom decisions have already been taken.

Lack of judicial review

As to the reference in **Paragraph 71** of the Report to the decision of 12 October 2016 by the Turkish Constitutional Court, the Government wishes to elaborate that this was a decision regarding the Decree Laws no. 668 and 669, which were examined within the context of review of norms by the Court. The Court ruled that a judicial review of the merits was not possible, referring to the provision in Article 148/1 of the Constitution, which reads "... decrees having the force of law issued during a State of Emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance". Therefore, the Constitutional Court rejected requests for the annulment of Decree Laws for lack of jurisdiction.

Contrary to the comment in the Report, it is evident that the Constitutional Court's decision of 12 October 2016 was a response to the request for the annulment of the Decrees Laws no. 668 and 669 through a review of norms, which is irrelevant to individual applications. The Constitutional Court has rejected the application based on the clear legal rule under Article 148 of the Constitution, due to lack of jurisdiction. However, no rule has been contained in the said provision regarding individual applications. Therefore, a generic interpretation of this decision of the Court to reach conclusions on individual applications is not appropriate.

Access to lawyer and due process

Paragraph 72 of the Report reads as follows :

Emergency decree 667, the first declared following the attempted coup, increased the amount of time a detainee could be held without charge from four to thirty days (article 6a). Article 19 of the Constitution allows for a maximum of four days and an extension of

this period during a state of emergency. However, in the case of Aksoy v. Turkey, the ECtHR held that detention of fourteen days without judicial review, even during a legitimate state of emergency, violated the state's human rights obligations.

The Government wishes to inform that pursuant to the Decree Laws no. 667 and 668 and the Laws no. 6749 and 6755 which are the approved form of these decrees, the duration of police custody had been extended to a maximum of 30 days during the emergency period, in respect of terror-related, attempted coup and collective offenses. The following procedural safeguards are available during police custody:

- An objection can be made against the detention order;
- Release can always be requested during police custody;
- Assistance of a lawyer is available;
- Medical reports are always obtained upon taking into and release from custody.

It has been laid down in a later Decree Law no. 684 that this detention period was shortened not to exceed seven days from arrest, excluding the time spent to take the suspect to the nearest court. However, this period can be extended for up to another seven days in writing due to compelling circumstances such as hardships in evidence collection and the large number of suspects. As can be seen, as a result of a risk assessment, the 30-day maximum detention period was reduced to seven days. This new arrangement complies with the judgments of *Aksoy v. Turkey* and *Larøss v. UK* by the ECtHR.

Furthermore, these detention periods are applicable only in respect of terror-related, attempted coup and collective offenses and detention periods for other offences are 1 day and can be extended for up to 4 days only.

The Report only refers to the provisions of the Decree-Law no. 667, a part of which have been revoked. However, there is no mention of the provisions introduced by the Decree-Law no. 684, which are now in force.

Enc. 2
